

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

ALLIEDBARTON SECURITY SERVICES

Employer

and

Case 4-RC-21590

PHILADELPHIA SECURITY OFFICERS UNION

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS TO ELECTION

Before: Noelle M. Reese
Hearing Officer

Appearances:

For the Employer: Marty N. Martenson, Esquire
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For the Petitioner: Lance Geren, Esquire
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I. STATEMENT OF THE CASE

Pursuant to a Stipulated Election Agreement executed by the parties and approved by the Regional Director for the Fourth Region of the National Labor Relations Board on September 18, 2009,¹ an election by secret ballot was conducted on October 9 and October 10 in the unit set forth in the Agreement.² The Tally of Ballots, copies of which were made available to the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters	124
Void Ballots	1
Votes cast for Petitioner	68
Votes cast against participating labor organizations.....	53
Valid votes counted.....	121
Challenged Ballots	2
Valid votes counted plus challenged ballots.....	123

On October 16, the Employer timely filed Objections to conduct affecting the results of the election, which allege as follows:

(1) The Union,³ by its officers, agents and/or representatives, engaged in inappropriate active campaigning at and near the polling area immediately prior to and during the election. This conduct substantially impaired the employees' exercise of a free choice and materially affected the outcome of the election.

(2) A Union official kept one or more lists of eligible voters and openly noted on the list when voters entered the polling area to vote. Union officials and Union election observers also openly consulted the list during the election. Eligible voting employees were aware that their names were being recorded by the Union as they entered the polling area. This conduct substantially impaired the employees' exercise of a free choice and materially affected the outcome of the election.

(3) During the election, Union officials confronted voters as they exited the polling area and demanded to know how they voted. The interrogation of voters

¹ All dates are in 2009 unless otherwise specified.

² The unit includes all full-time and regular part-time security guards employed by the Employer at the following Philadelphia Museum of Art locations: (1) Main Building of the PMA; (2) Perelman Building; (3) Rodin Museum; (4) Mount Pleasant Historic House; and (5) Cedar Grove Historic House, excluding all other employees including office clericals, managerial employees, and supervisors as defined in the Act.

³ The terms "Union" and "Petitioner" are used interchangeably in this Report.

was both visible and audible to voters who were entering the polling area to vote. This conduct intimidated and coerced voters and interfered with the voters' exercise of their free choice and materially affected the outcome of the election.

(4) As employees entered the polling area to vote, Union officials stated to voters a "vote count" and told voters that the Union was winning by a certain number of votes. This conduct suggested to voters that their votes were futile and substantially impaired the employees' exercise of free choice and materially affected the outcome of the election.

On October 30, the Regional Director issued a Notice of Hearing on Objections to the Election, ordering that a hearing be held to resolve the Employer's Objections. Pursuant to the Regional Director's Notice of Hearing, I conducted a hearing on this matter on November 24 in Philadelphia, Pennsylvania. Based on the evidence presented in that hearing, including the testimony of the witnesses and my assessment of their demeanor, as well as the post-hearing briefs, I find and recommend as follows:⁴

II. FINDINGS OF FACTS

A. The Employer's Operations

The Employer provides contract security services to the Philadelphia Museum of Art (herein called the PMA) located in Philadelphia, Pennsylvania. The security officers work at the following PMA locations: the Main Building of the PMA, the Perelman Building, the Rodin Museum, the Mount Pleasant Historic House, and the Cedar Grove Historic House.

There were approximately 124 employees in the bargaining unit at the time of the election. The work shifts for these bargaining unit employees are: 9:30 a.m. to 5:15 p.m.; 4 p.m. to 12 p.m.; and 12 p.m. to 8 a.m. The majority of bargaining unit employees work the 9:30 a.m. to 5:15 p.m. shift.

B. The Time and Place of the Election

The election was held in three sessions: Friday, October 9, 2009 from 6:30 a.m. to 10:30 a.m. and from 2 p.m. to 6 p.m., and Saturday, October 10, 2009 from 6:30 a.m. to 10:30 a.m. The election took place in Room A-741 which is located in the northeastern corner of the Main Building of the PMA. Directly outside Room A-741 is a small room with a double doorway leading out into a hallway. Directly outside this double doorway is post A-7 where a security guard sits at a desk and checks baggage and identification for

⁴ I have reviewed and weighed all testimony in light of the entire record. The facts found in this report are based on the record as a whole as well as my observation of the witnesses. Contradictory testimony not specifically mentioned has not been disregarded but has been rejected as not credible.

individuals entering the exterior A-7 entrance⁵ (herein called the employee entrance). The double doorway is approximately seven feet from the door of Room A-741. The post is located in a hallway which leads in two directions. To the left of the A-7 post, the hallway leads to the interior of the PMA and locker rooms. To the right of the post and the double doorway, the hallway leads to a set of automatic glass doors and then to the employee entrance. The employee entrance is approximately 24 feet and eight inches from the door leading into the voting area. During the majority of the election, the employee entrance doors were closed. However, there were times during the election when one of the employee entrance doors was propped open as occurred from 4 p.m. to 6 p.m. on October 9.

Other than the employee entrance, employees may also enter the loading dock entrance located directly below the employee entrance and the three public entrances called the East, West, and South entrances. The majority of employees entered through the employee entrance to vote in the election.

C. The Preelection Conference and the Designated "No-Electioneering" Area

On October 9 at 6 a.m., the Board agent overseeing the election conducted a preelection conference. Attending this conference were Brent O'Bryan, the Employer's Region Director of Human Capital Management, the Employer's observer, Latoya Finney, the Union's attorney, Lance Geren, the Union's representative, Fabricio Rodriguez, and the Union's observer, Cecelia Lynch. At this conference, the Board agent designated the "no-electioneering" area as Room A-741, the small room directly outside Room A-741, and immediately outside the small room near post A-7. The Board agent prohibited any congregating outside of the voting room and at the A-7 post, with the exception of any voting lines, and informed the parties' representatives that he would not monitor anything outside. The Board agent posted a "no-electioneering" sign on the blackboard in the small room outside Room A-741. The Board agent neither expressly permitted nor prohibited electioneering outside the employee entrance.⁶

⁵ The exterior A-7 entrance is commonly known as the employee entrance because it is open when other public entrances are closed and the majority of employees commonly use this entrance.

⁶ O'Bryan and Rodriguez gave conflicting accounts as to whether the Board agent explicitly permitted electioneering outside the employee entrance during the preelection conference. Despite other witnesses having been present, only O'Bryan and Rodriguez testified concerning the Board agent's statements. I credit O'Bryan's testimony that the Board agent did not expressly allow electioneering outside the employee entrance during the preelection conference. I discredit the testimony of Rodriguez that after he had asked whether they could campaign outside the employee entrance, the Board agent replied that all electioneering had to be outside the employee entrance's metal doors and that he did not want to hear any Union campaigning from the voting room. While Rodriguez' testimony was rather unclear on direct examination on this point, O'Bryan's testimony was entirely clear and consistent.

D. The Union Campaigned Outside the Employee Entrance During the Election

Union agent Rodriguez coordinated an effort along with the Union committee members to campaign for the Union outside of the Main Building of the PMA during the three voting sessions on October 9 and October 10. As the Executive Director of Philadelphia Jobs with Justice, Rodriguez coordinated community volunteers to stand outside the employee entrance of the PMA during the voting sessions to distribute Union fliers, hold Union signs and encourage employees to vote for the Union as they entered and exited the building.

Philadelphia Jobs with Justice is a local community organization that conducts social justice campaigns. As the only paid employee of this organization, Rodriguez recruits a large group of community volunteers to help run the organization's operations. The Union's headquarters has the same address as the headquarters of Philadelphia Jobs with Justice. This organization has been assisting the Union in trying to organize this bargaining unit for several years.

The Union does not have any paid officials or employees, but it has 15 bargaining unit employees who serve on a Union committee and President Donald Binzi. Denita Bryant, Cecelia Lynch, Nate Crawley, and Bobby Gillette are members of the Union committee and they communicate with their coworkers about the Union.

Rodriguez testified that he directed the activities of over 80 Union volunteers during the two days of the election. Rodriguez directed the volunteers as to what to do and where to stand. Among other things, Rodriguez told them not to block the doorway. At times, Rodriguez, while wearing clothing stating, "Jobs with Justice," stood about five to six feet from the employee entrance. Union Coordinators Dan Duffy and Chris White also directed volunteers and contacted Rodriguez if they needed more fliers or more volunteers.

At times, there were as many as ten Union volunteers standing on each side of the ramp directly outside the employee entrance. The ramp is about 12 feet long and 9 feet wide across. Four sets of doors separated the voting room from the employee entrance where the Union representatives were campaigning and two sets of doors separated the no-electioneering area from the area outside the employee entrance. The Union volunteers did not block egress or ingress to the building and were at all times standing on City of Philadelphia property. The fliers urged employees to vote for Union representation. Some Union volunteers held signs measuring 20 inches by 30 inches that stated, "Have you voted 'YES' yet?" At times, these pro-Union signs were leaning against the exterior wall of the PMA near the employee entrance. While standing outside the employee entrance, Union volunteers verbally encouraged eligible employees to vote for Union representation.

In addition to campaigning outside the employee entrance, the Union also campaigned at other areas near the PMA during the voting periods. On October 9 at about 2:10 p.m., several Union volunteers distributed Union handbills near the bus stop

about 50 feet from the West Entrance of the PMA. During the morning voting session of October 10, Rodriguez walked alongside approximately 10 eligible voters from the western side of the Main Building for about 300 feet to within a few feet from the employee entrance. As Rodriguez walked with these voters, they discussed the election and Rodriguez informed the employees that he believed the Union was winning. Union Coordinator Dan Duffy likewise escorted approximately seven to eight voters to within a few feet of the employee entrance. Union volunteers also approached employees in the parking lots during the polling periods to encourage them to vote for the Union and asked them whether they had voted yet.

There is no evidence that anyone engaged in electioneering in the designated "no-electioneering" area or that employees in the "no-electioneering" area could hear anything related to the Union's campaigning outside the employee entrance. Additionally, there is no evidence that any Union agents or any other persons made any threats to bargaining unit employees at any time.

E. Union Agents Maintained Lists of Voters and Questioned Employees How They Voted

Rodriguez testified that the Union maintained lists of bargaining unit employees and its Union supporters to keep track of which employees had voted and how they voted as part of its "Get Out to Vote" activities during the two day election period. The purpose of the Union keeping these lists was to ensure that all of its Union supporters came to the polls to vote.

Throughout the election, Rodriguez maintained a copy of the *Excelsior* list of all eligible voters on his person at all times. Rodriguez primarily kept this list in his back pocket and never held the list on a clipboard.⁷ During the election, Union Coordinators Daniel Duffy and Chris White also kept lists of Union supporters that had been compiled earlier based on preelection meetings and home visits.

As employees exited and entered the employee entrance during the polling periods, Rodriguez and Union volunteers asked them their names, whether they worked for the Employer, and whether they had voted for the Union. If they had already voted, then Rodriguez and other Union volunteers asked employees how they had voted and then kept track of their answers by either writing down or mentally noting as to their responses. Rodriguez stated that the Union had spoken to about 75 employees during the two day period and that he did not know everyone that he approached. After the polls had closed on each of the days, Rodriguez and Union committee members consulted his

⁷ Although employee Alexander Leone testified that he saw Rodriguez holding a clipboard, I credit Rodriguez' testimony that he maintained the master *Excelsior* list in his back pocket and he never used a clipboard. Rodriguez was adamant and his demeanor was completely credible on this point. Additionally, the photographs of Rodriguez standing outside the employee entrance corroborate Rodriguez' account as they do not show him holding a clipboard and no other witness testified to seeing Rodriguez holding a clipboard.

Excelsior list and their lists of supporters to determine which of their supporters had voted and which ones they still needed to contact to vote in the election. They examined these lists off to the side of the PMA and away from employees. After consulting these lists, the committee members and volunteers contacted employees who had not yet voted to encourage them to come in to vote and give them rides to the polls if needed.

F. Employee Knowledge of List Keeping

The Employer only presented evidence of one bargaining unit employee who saw any Union official or volunteer examining a list of employees, and this employee, Alexander Leone, had already voted at the time he saw the list. Leone worked an atypical work shift from 10 a.m. to 6 p.m. After the polls had closed on October 9 at about 6:15 p.m., employee Leone exited the employee entrance and walked towards the parking lot. Rodriguez and Union Committee Member Nate Crawley then started talking to Leone; no other employees were present. Rodriguez asked Leone for his name and whether he worked for the Employer. Leone told him his name and that he worked for AlliedBarton. Rodriguez then asked Leone how he voted in the election. Leone told Rodriguez that he did not want to tell him how he voted. Rodriguez asked Leone two more times how he had voted and told him that it was okay to tell him because he did not work for the Employer, but Leone kept insisting that he did not want to tell him how he voted. During this discussion, Leone saw that Rodriguez was holding a list of eligible voters and the list had some checkmarks by certain names and green highlighting on other names. Leone saw that Rodriguez placed a checkmark next to Leone's name. Leone surmised that the list indicated how employees had voted in the election, and Rodriguez never denied this assertion. There is no evidence that Leone disclosed the Union's list keeping activities to any other employee.

The only other individual who saw Rodriguez examining a list outside the employee entrance was not a bargaining unit employee. Brent O'Bryan, the Employer's Region Director of Human Capital Management, saw Rodriguez and Union Committee Member Denita Bryant examining a list with green highlighting in a portfolio while they were standing in the street about 22 feet from the employee entrance sometime after 6 p.m. on October 9. O'Bryan did not see any other employees present and he did not see what the list contained.

Four other employees testified that Union representatives questioned them outside the employee entrance, but none of these employees testified as to having seen the Union representatives recording their responses on paper or holding any lists of employees. Volunteers had asked employee Shaunte Tucker at numerous times in the afternoon on October 9 whether she had voted and how she had voted, but Tucker testified that a female Union volunteer was not writing anything down at the time she questioned her. Tucker only recalled seeing a female Union volunteer holding a folder. Another employee, Donald Lindsey, was present when a Union volunteer questioned Tucker if she voted and how she vote, but the record does not establish whether Lindsey had voted at the time. When Rodriguez asked employee Anthony Jefferson whether he had voted

"Yes" for the Union at 9:20 a.m. on October 9 after he had already voted, Jefferson saw that Rodriguez was only holding Union pamphlets in his hand.

G. The Union Informed Employees that the Union Was Winning the Election During the Voting Sessions

During the voting sessions, Union supporters indicated to bargaining unit employees that the Union was winning the election. On October 10 at about 7:45 a.m., an unidentified male Union volunteer approached employee Phyllis Johnson on the sidewalk outside the employee entrance. The Union volunteer asked her, "Did you vote?" Johnson replied, "Well, I'm going today." The volunteer then stated, "Well, we're winning. The Union is up by 12 votes." Johnson asked, "Well, how do you know that? We haven't even counted the votes yet." The volunteer replied, "We're doing this for you all." No other employee overheard this conversation.⁸ Johnson had not yet voted at this time, but she testified that this encounter did not change her vote in the election. There is no evidence that Johnson discussed this comment with any other employee. Rodriguez further told about ten employees that he believed the Union was winning when he escorted them towards the employee entrance during the morning polling sessions of October 10.

At about 5:15 p.m. on October 9, while at the A-7 post, employee Shaunte Tucker saw employee Jennifer Collazo coming from the direction of the interior of the museum and walking by the A-7 post and clapping her hands. Tucker then saw Collazo standing and clapping in the automatic sliding glass door area in the hallway to right of A-7 post and stated "We're winning." When Collazo made this statement, she was not in the "no-electioneering" area. The record does not indicate whether any other person was present to over hear Collazo's statement. Collazo is a Union committee member and visible Union supporter, but there is no evidence that she was involved in the Union's hand billing activities outside the employee entrance. Tucker had already voted in the election at the time.

H. Times when Employees Voted in the Election

Employees were allowed to vote before their shift, at the end of their shift, or during their shift if a coworker relieved them. Consequently, not all employees who entered the PMA through the employee entrance would have immediately voted. Some employees voted without going through the employee entrance because they entered the building through a different entrance. For instance, employee Anthony Jefferson voted

⁸ Johnson testified that she surmised that the male Union volunteer made this same comment about the Union winning by 12 votes to employee Sante Amaro, but Amaro failed to corroborate this account. Consequently, I find that Amaro did not overhear Johnson's conversation with the Union volunteer and a Union volunteer did not make any comment about the Union winning by 12 votes to Amaro. I also credit Amaro that no other employees were present when Amaro and Johnson were outside the employee entrance on October 10. Based on overall demeanor, I credit Amaro over Johnson on all contradictory accounts. Unlike Amaro, Johnson had covered her mouth when testifying and tended to speculate while testifying.

without ever passing through the employee entrance since he entered the building through the loading dock entrance.

III. ANALYSIS

A. Employer's Objections 1 and 4: Electioneering

In Objections 1 and 4, the Employer alleges that the Union engaged in impermissible electioneering activity during the voting sessions. The Employer argues that the Union's electioneering outside the employee entrance was objectionable because it created a gauntlet through which voters had to pass to vote and because the Union told employees that it believed the Union was winning. The Union does not deny that its agent and supporters were present and campaigned on behalf of the Union during the voting sessions outside the employee entrance, but contends that such conduct was located outside of the no-electioneering area and therefore was not objectionable.

As the objecting party, the Employer has the burden of establishing that the alleged objectionable conduct reasonably tended to interfere with employees' exercise of free choice. *Trump Plaza Hotel and Casino*, 352 NLRB 628, 629 (2008). This burden is a heavy one because there is a strong presumption that ballots cast under Board supervision reflect the true wishes of the voters. See *Safeway, Inc.*, 338 NLRB 525, 525 (2002).

The Board prohibits any prolonged conversations between a representative of a party to the election and employees in the polling area or waiting in line to vote. *Milchem Inc.*, 170 NLRB 362, 363 (1968). However, the Board does not apply its "no-electioneering" rules to set aside elections, whenever electioneering takes place, at or near the polls, regardless of the circumstances. *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118 (1982), *enfd.* 703 F.2d 876 (5th Cir. 1983). When faced with evidence of electioneering, the Board considers a number of factors to determine whether the conduct is sufficient to warrant an inference that it interfered with the free choice of the voters. *Id.* at 1119. In *Boston Insulated Wire & Cable Co.*, the Board recognized that "it is unrealistic to expect parties or employees to refrain totally from any and all types of electioneering in the vicinity of the polls" and set forth the factors to be considered in electioneering cases including: (1) whether the conduct occurred within or near the polling place; (2) the nature and extent of electioneering; (3) whether it was conducted by a party to the election or by employees; and (4) whether the electioneering is conducted within a designated "no electioneering" area or contrary to the instructions of the Board agent. *Id.* at 1118-1119. See also *American Medical Response*, 339 NLRB 23 *fn.* 1 (2003).

The Board has permitted Union electioneering when it occurs outside the "no electioneering" area, does not target employees waiting in line to vote, and is not contrary to the Board agent's instructions. See *Boston Insulated Wire*, above at 1119. In *Boston Insulated Wire*, the Board found it was not objectionable for union officials to distribute campaign literature and speak to employees just outside a set of glass doors that led to the polling place. *Id.* Most significant to the Board was the fact that the glass doors insulated

voters from the electioneering. *Id.* Similarly in *Lily Transportation Corp.*, 352 NLRB 1028, 1028 (2008), the Board found that it was not objectionable for Union officials to campaign and urge employees to vote for the Union in a hotel lobby as employees passed through to vote on the third floor of the hotel. The Board also found that three union representatives in *Harold W. Moore & Son*, 173 NLRB 1258, 1258 (1968), were not engaged in objectionable electioneering conduct when they talked with several employees in a parking lot about 60 feet from the ballot box while the election was in progress.

The Board has further found that Union supporters in large numbers campaigning and distributing literature to employees at the entrance of the facility during polling periods did not warrant setting aside elections. See *Comcast Cablevision of New Haven*, 325 NLRB 833, 838 (1998); *Firestone Textiles Co.*, 244 NLRB 168, 171, 173 (1979). In *Comcast Cablevision*, the Board found a Union-sponsored demonstration of approximately 20-25 individuals urging employees to vote for the Union, wearing and holding placards for the Union, and distributing leaflets and pins outside the facility during the polling period did not constitute objectionable conduct. *Above* at 833.

The Board has examined whether a party's presence outside the facility during an election is objectionable under both electioneering and surveillance case law. In *J.P. Mascaro & Sons*, 345 NLRB 637, 639 (2005), the employer's president stood outside of the employer's facility about 30 feet from the front door of the facility for most of the election day. The president spoke to employees and shook hands with them, but there was no evidence that any conversations occurred in the polling area, the designated "no electioneering" area, or near the line of voters. *Id.* Examining the facts under both electioneering and surveillance case law, the Board found that the president's conduct did not warrant setting aside the election and emphasized that it would have reached the same result if the case had involved a union official standing outside the Employer's facility for the entire day. *Id.* at 639 fn. 5.

I find that any campaigning which may have taken place outside the employee entrance is attributable to the Union. Rodriguez, a stipulated Union agent, testified that he organized and directed the volunteers outside the employee entrance as to where they should stand and what they should do. Consequently, I find that these Union volunteers campaigning outside the PMA were acting as agents of the Union. See *Cannery, Warehousemen, Food Processors Local 748*, 246 NLRB 758, 758 (1979).

Applying *Boston Insulated Wire*, I find the Union's campaigning during the voting sessions did not warrant setting aside the election for several reasons. First, the Union did not campaign in the polling area, as four sets of doors separated the voting room from the area outside the employee entrance where the Union representatives were campaigning and two sets of doors separated the no-electioneering area from the area outside the employee entrance. Second, in examining the nature and extent of the electioneering, I find that the Union's peaceful campaigning was not accompanied by any threats or blocking of entrances. The Union campaigning was not directed at employees waiting in line or in the polling area, but rather was directed to employees as they entered and exited the building. Third, although the campaigning was authorized and organized

by the Union, the facts of this case are more analogous to the cases where the Board found such electioneering was not objectionable. See *Lily Transportation*, 352 NLRB at 1030-1031, *Boston Insulated Wire*, 259 NLRB at 1119; *Comcast Cablevision*, 325 NLRB at 838. Lastly, the Union's campaigning did not contravene any instructions of the Board agent as he never prohibited campaigning outside the employee entrance and the Union campaigning did not occur in the "no-electioneering" area. There is no evidence in the record that employees could hear anything related to the Union's campaigning outside the employee entrance in the "no electioneering" area during the election. At the critical times, while waiting in line to vote and casting a ballot, employees were insulated from the Union's electioneering.

In its brief, the Employer argues that the Board has set aside elections when employees needed to pass by a party agent in order to vote. However, the cases that the Employer relies on are distinguishable because these cases involved the Board setting aside elections when a party actually electioneers in the designated "no-electioneering" area or in contravention of the Board agent's instructions. See *Nathan Katz Realty v. NLRB*, 251 F.3d 981, 993 (D.C. Cir. 2001); *Brinks, Inc.*, 331 NLRB 46, 46 (2000); *Pepsi-Cola Bottling Co.*, 291 NLRB 578, 578-579 (1988); *Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827, 829-830 (1984); *Star Expansion Industries Corporation*, 170 NLRB 364, 365 (1968); *Performance Measurements Co.*, 148 NLRB 1657 (1964). Moreover, not all voters in this case passed the Union campaigning outside the employee entrance; some, like Jefferson, used other entrances to enter the PMA. Additionally, not all employees voted immediately after entering the building, as employees were allowed to vote during their shifts if they were relieved by a coworker or after their shifts.

The facts here are further clearly distinguishable from the facts in *Bro-Tech Corp.*, 330 NLRB 37, 40 (1999) where the Board set aside an election when a Union's sound truck broadcasted music, including pro-Teamsters songs, throughout the election day in contravention of *Peerless Plywood Co.*, 107 NLRB 427 (1953). Here, there was no evidence of chanting or broadcasting of the Union's campaign message to a captive audience, but rather employees were free to walk away from such brief conversations in which they were urged to vote for the Union. See *Comcast Cablevision*, 325 NLRB at 833 fn. 2. Similar to the facts of *Comcast Cablevision*, Union agents urged employees to vote for the Union on their way to work, but such conduct is not objectionable. *Id.*

The Employer further argues that the election should be set aside because the Union told employees that it was winning the election as part of its campaigning and thus suggested that it was futile to vote against the Union. However, the Employer fails to cite a single Board case to support its position that a union engages in objectionable conduct by informing voters that the Union was winning the election, and I am unaware of any case support for this proposition.

I find that there was nothing objectionable about Rodriguez telling employees that he thought the Union was winning as well as the unidentified Union volunteer informing

employee Johnson that the Union was winning by 12 votes.⁹ In my view, these statements constitute obvious campaign propaganda that employees clearly recognize. See *Metropolitan Life Insurance Co.*, 266 NLRB 507, 508 (1983); *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982); *Corn Products Refining Co.*, 58 NLRB 1441, 1442 (1944) (Board acknowledges that employees “undoubtedly recognize such [campaign] propaganda for what it is, and discount it”). Johnson realized the volunteer’s statement was propaganda and it was not an official count of how employees voted because she showed her skepticism by remarking to the volunteer, “Well, how do you know that? We haven’t even counted the votes yet.”

Similarly, I find Union committee member, Jennifer Collazo, clapping and stating, “We’re winning,” outside the “no-electioneering” area does not amount to objectionable conduct. Although Collazo was a Union committee member, the record failed to establish that she either was a part of the Union volunteers outside the employee entrance or had any formal role with the Union that would enable her to be treated as its agent. See *Foxwoods Resort Casino*, 352 NLRB 771, 772 (2008). I find that employee Collazo’s brief outburst outside the “no electioneering” area was not so disruptive as to require setting aside the election. See *Boston Insulated Wire*, 259 NLRB at 1119 fn. 11; *Lily Transportation Corp.*, 352 NLRB at 1031. There is also no evidence that any prospective voters heard Collazo’s statement in the polling area.

In conclusion, the Employer has not met its burden of establishing that the Union has engaged in objectionable electioneering. I therefore recommend overruling Employer’s Objections 1 and 4.

B. Employer’s Objections 2 and 3: Union Maintaining List of Voters and Interrogating Employees as to How They Voted

In Employer’s Objections 2 and 3, the Employer argues that the election should be set aside because the Union questioned employees as to how they voted and then openly recorded their responses on lists. The Union does not deny that Union agents questioned employees and recorded how they voted on the days of the election, but argues that such conduct was merely de minimis and not objectionable because Union agents took steps to secure their lists from the view of employees and only one bargaining unit employee saw a list, and not until after he had voted.

The Board has long held that the only list of voters that may be maintained in Board-conducted elections is the official voter eligibility list used to check off the names of voters as they receive their ballots. *Chrill Care, Inc.*, 340 NLRB 1016, 1016 (2003). However, the Board generally will not find such list keeping coercive and grounds for setting aside an election unless it can be shown or inferred from the circumstances that the employees knew that their names were being recorded. *Id.* The Board will set aside

⁹ However, informing an employee about an unofficial vote tally may be evidence of employee knowledge of the Union maintaining an authorized list of persons who have voted. See *Janler Plastic Mold Corp.*, 208 NLRB 167, 172 (1974). This basis for an objection is discussed fully in the next section.

an election on this basis even without a showing of actual interference with the voters' free choice. *International Stamping Co.*, 97 NLRB 921, 922 (1951); *Accord: Sound Refining, Inc.*, 267 NLRB 1301, 1301-1302 (1983); *Masonic Homes of California*, 258 NLRB 41 (1981); *Piggly-Wiggly*, 168 NLRB 792 (1967); *Belk's Department Store*, 98 NLRB 280 (1951).

Evidence of employee knowledge of list-keeping can be either affirmatively shown or inferred from the circumstances. *A.D. Julliard & Co.*, 110 NLRB 2197, 2199 (1954). An important factor in evaluating whether knowledge can be inferred from the circumstances is whether the individuals maintaining the lists had openly engaged in such conduct. See *Cross Pointe Paper Corp.*, 330 NLRB 658, 662 (2000); *Sound Refining, Inc.*, 267 NLRB 1301, 1302 (1983) (inferring employee knowledge based on the fact that the list keeper was a conspicuous election observer and no evidence that he attempted to conceal his conduct).

The Board has prohibited parties from maintaining lists of employees who have voted not only in the polling area by observers, but also by party agents outside of the voting area. See *Piggly-Wiggly*, 168 NLRB 792, 793 (1967). In *Piggly-Wiggly*, the Board found objectionable Union representatives standing four to six feet from the entrance of the store and openly marking employees' names off on a list as employees entered to vote in the election. *Id.*

The Board will not, however, set aside an election if it can be shown that the unauthorized list keeping was only a de minimis breach of a Board election rule. *Robert's Tours, Inc.*, 244 NLRB 818 fn. 5 (1979) (finding de minimis breach when list keeping could have tended to interfere with only a single voter) review denied mem. 663 F.2d 223 (9th Cir. 1980); *Brown Drilling Co.*, 172 NLRB 1267, 1287 (1968) (employee awareness not shown). In *Cerock Wire & Cable Group, Inc.*, 273 NLRB 1041, 1041 (1984), the Board found only a de minimis breach of the rule against list keeping when no employee other than the Employer's observer saw that the Union's observer kept a tally of hash marks in two columns on a sheet of paper that did not include employee names. The Board found that it could not be inferred that other employees had seen this list because the Union observer had attempted to conceal the tally by keeping her arms over the paper. *Id.*

Board cases that have dealt with improper lists have found that it will only be objectionable if employees know "their names were being recorded." See *Southland Containers, Inc.*, 312 NLRB 1087, 1087 (1993); *Piggly-Wiggly*, 168 NLRB at 792. The Employer cites no cases for the proposition that a Union engages in objectionable conduct by merely questioning employees how they voted while campaigning during the election without employees' knowledge that the Union recorded their responses.

The Board has found that a union's pre-election polling of voters and recording employees' responses did not warrant setting aside an election. *Springfield Hospital*, 281 NLRB 643, 692-693 (1986) (not objectionable for union to ask employees whether they were for or against union and record responses on a chart), *enfd.* 899 F.2d 1305 (2d Cir. 1990); *Kusan Mfg. Co.*, 267 NLRB 740, 746 (1983) (not objectionable for union to solicit

employees to sign petition), enfd. 749 F.2d 362 (6th Cir. 1984); see also *J.C. Penney Food Department*, 195 NLRB 921, 921-922 fn. 4 (1972) (not objectionable for union to poll employees as to how they would vote). In *Fessler & Bowman, Inc.*, 341 NLRB 932, 934 (2004), the Board recently emphasized these lines of cases to hold that Union solicitation of mail ballots did not constitute objectionable conduct¹⁰ and stated:

Under well-established Board law, however, union conduct that causes an employee to signal his favor or disfavor of the union does not, without more, constitute objectionable conduct. Specifically, a union may ask employees whether they favor the union so long as it does not coerce employees while conducting its poll.

The Board has remarked that “[d]irect personal solicitation and polling are the primary means by which unions effectuate the policies of the Act,” and “unions, unlike employers, can lawfully solicit employees to reveal their stance in a campaign.” *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591, 595-596 (2006).

Based on the record evidence, I conclude that the Employer has not met its burden of showing that the Union’s list keeping was sufficiently open or known to employees to warrant setting aside this election. Besides the Union committee members involved in the list keeping activities,¹¹ the record only established that two employees, Johnson and Leone, knew that the Union was maintaining a tally of how employees voted and Leone had already voted at the time he found out about the list. Although Johnson never testified that she saw any list of employees, I find that it can be inferred that Johnson knew that the Union was recording a tally of how employees voted when an unidentified Union volunteer disclosed to her before she voted that the Union was winning by 12 votes.

I cannot infer from the overall circumstances that other employees knew about the Union’s list keeping activities. As there is no evidence that either Leone or Johnson disseminated what happened to them to other employees who had not yet voted, I am not presuming dissemination to other employees. See *Metz Metallurgical Corp.*, 270 NLRB 889 fn. 3 (1984). Despite the Leone incident, I do not find that Union agents openly kept its lists in plain view of employees. Rodriguez kept his master *Excelsior* list in his back pocket and went off to the side away from employees to consult the list with the Union committee members when voting sessions had ended. Working an atypical shift, Leone only saw the list after polls had closed for the day. Although Rodriguez testified that volunteers either wrote down or made mental notes of who voted, there is no evidence that these volunteers made these notations in the presence of employees. Tucker

¹⁰ The Board found, however, that the Union’s collection of the mail ballots was an objectionable interference with Board processes. *Id.*

¹¹ In *Robert’s Tours*, the Administrative Law Judge did not consider union supporters’ own involvement in keeping an unauthorized list as evidence of employee knowledge because their voting choices could not have been affected. 244 NLRB at 824. I conclude the same here.

specifically testified that the Union volunteer was not writing anything down at the time she was questioned as to how she voted. Although four other witnesses, besides Leone, testified to being questioned by the Union, none of these witnesses testified that they saw their responses being recorded. Thus, I find that the record failed to establish that employees, other than Leone, Johnson and Union committee members, were aware of the Union's lists.

In its brief, the Employer argues that the Union's interrogation of employees as to how they voted destroyed the secrecy of the representation election. However, the Union's polling did not undermine the election's secrecy because employees were free to refrain from sharing their voting choices and there was no evidence of any threatening conduct. The simple act of asking how employees voted or whether voted yet does not necessarily indicate that the questioner is recording the response. Merely questioning voters as to their Union sentiments, absent any evidence of threatening conduct, is permissible conduct. See *Fessler & Bowman, Inc.*, 341 NLRB at 934. The Board has not yet prohibited Union polling during an election. Since unions are permitted to poll employees before an election, I do not see how it would be inherently coercive to poll employees during an election away from the polling area and absent any threatening conduct. As there was insufficient evidence that employees knew their responses were being recorded, I find that the Union merely questioning voters how they voted after they had already cast their ballots did not amount to objectionable conduct. See *id.*

Under all these circumstances, I find the list keeping and questioning of employees have not been shown to be a substantial breach of the Board's election rules. The evidence only established that only one prospective voter, Johnson, knew about the Union's improper tally. As the Union won the election by 15 votes with two challenged ballots, I find the existence of these lists had only a de minimis effect on the election and would not warrant setting aside an election. See *Robert's Tours, Inc.*, 244 NLRB at fn. 5. Based on the foregoing and the record as a whole, I recommend that Employer's Objections 2 and 3 be overruled.

IV. CONCLUSION AND RECOMMENDED ORDER

In accordance with the above findings, I recommend that the Employer's Objections be overruled. As the Tally of Ballots shows that the Union received a majority of the valid votes counted, I further recommend that the Board issue a Certification of Representative.

Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. A request for review may also be submitted by electronic filing. Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by the close of business on **January 19, 2010**, at 5:00 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative,**

parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.¹² A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab and then click on the E-filing link on the pull-down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed at Philadelphia, Pennsylvania on January 4, 2010.



Noelle M. Reese

NOELLE M. REESE

Hearing Officer, National Labor Relations Board, Region 4
615 Chestnut Street, 7th Floor, Philadelphia, Pennsylvania 19106

¹² A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.